

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

MILEPOST TRANSPORTATION, INC.

Employer

and

Case 6-RC-11731

TEAMSTERS LOCAL UNION 261 A/W
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Kim Siegert, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.¹

Upon the entire record² in this case, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

¹ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by October 14, 1999.

² The Employer filed a timely brief in this matter which has been duly considered by the undersigned. The Petitioner did not file a brief.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(l) and Section 2(6) and (7) of the Act.

As amended at the hearing, the Petitioner seeks to represent a unit of all full-time and regular part-time drivers employed by the Employer at the Norfolk Southern Railroad Company's Conway, Pennsylvania; facility excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act and all other employees. Although the parties are in accord with both the scope and composition of the unit, the Employer contends that it is not subject to the jurisdiction of the Act. The Employer asserts instead that it is subject to the jurisdiction of the Railway Labor Act (RLA) because (a) the services provided by the Employer are those traditionally performed by employees of rail carriers and (b) at all times the rail carrier for which it provides services exercises direct and/or indirect control of the Employer. There are approximately 38 employees in the petitioned-for unit. There is no history of collective bargaining for any of the employees involved herein.

The only issue submitted for hearing was, as noted, whether the Employer, an Illinois corporation which provides shuttle service for railroad and airline crews at a number of locations throughout the United States, is subject to the jurisdiction of the Act. The Employer contends that because of its single customer relationship with Norfolk Southern Railroad Company (NSR), which operates an interstate railway system, at NSR's Conway, Pennsylvania facility, it is not subject to the jurisdiction of the Act. The Employer does not claim to be a common carrier itself. The Petitioner contends that the control that NSR exercises pursuant to its contract with the Employer is not sufficient to divest the Board of jurisdiction.

For a number of years, the Board has followed a general practice of referring cases to the National Mediation Board (NMB) when a party raises a claim of arguable RLA jurisdiction.³ Under the two part test developed by the NMB for resolution of such issues, the NMB first

³ See United Parcel Service, 318 NLRB 778 (1995), enfd. 92 F.3d 1221 (D.C. Cir. 1996).

determines whether the nature of the work performed is that traditionally performed by employees of air or rail carriers. Second, the NMB determines whether a common carrier, or carriers, exercises direct or indirect ownership or control of the employer. Both parts of the test must be satisfied for the NMB to assert jurisdiction.⁴ When it is clear that an employer is not subject to the RLA, there is no need to refer the case to the NMB. Federal Express Corp., 317 NLRB 1155 (1995); System One Corp., 322 NLRB 732 (1996); D & T Limousine Service, Inc., 320 NLRB 859 (1996); D & T Limousine Co., Inc., 207 NLRB 121 (1973). For the reasons set forth below, I find that the Board has jurisdiction in this case, and that referral to the NMB, as requested by the Employer, is unnecessary.

The Employer is a subsidiary of Milepost Inns, and is engaged in the specialty transportation business including the provision of transportation services to rail and air carriers.⁵ Its sole rail carrier customer is NSR, which has operations located throughout the United States. Administratively, the Employer is divided into various divisions and subdivisions, with its Conway operation comprising part of the Pittsburgh subdivision of the Employer's Eastern Division. The Eastern Division provides transportation services solely to NSR at various NSR railyards. NSR's Conway facility is the second largest railyard in the United States encompassing a geographical area of approximately 6-1/2 square miles.

The Employer's Eastern Division is under the overall supervision of Division General Manager Gene Kernohan. Reporting to Kernohan are three subdivision managers including

⁴ Id. at 779-780, fn. 7.

⁵ Milepost Inns is engaged in ventures other than specialty transportation services. These ventures include the construction and management of hotels. The Employer was incorporated on July 22, 1999, following its merger with ATC Vancom, another specialty transportation company. The Employer's predecessor, Milepost Industries, was also engaged in the specialty transportation business prior to the aforementioned merger. In addition to providing transportation services to rail and air carriers, a small part of the Employer's business is to provide van service to handicapped persons pursuant to contracts with various local governments. This service is not provided by the Employer in the Pittsburgh—Western Pennsylvania area. The specialty transportation services provided to air carriers take place in the western part of the United States.

Pittsburgh subdivision manager Earl Wagner.⁶ In addition to Conway, the Pittsburgh subdivision consists of transportation services furnished to NSR at NSR's downtown Pittsburgh, West Brownsville, and Shire Oak facilities. NSR's Conway facility is located approximately 20 miles to the northwest of Pittsburgh. Approximately 80 employees, including the 38 employees employed at Conway, comprise the Pittsburgh subdivision. The Pittsburgh subdivision's administrative office is located approximately four blocks from the Conway facility.

As previously indicated, the transportation services provided to NSR by the Employer at Conway and throughout the Eastern Division, as well as other divisions, consists of shuttle or taxi service wherein the Employer's drivers transport railroad crews in vans between various pick-up and drop-off points. These services are provided pursuant to the provisions of a "Taxi Service Agreement" between the Employer and NSR.⁷ Article 8 of that Agreement provides that the Employer is and shall remain an "independent carrier" and shall be "solely responsible for, and [NSR] shall not participate in, the employing or supervising of each person engaged in discharging [the Employer's] responsibilities under this contract; all such persons shall be the sole agents, servants and employees of [the Employer] . . . Nothing contained in this order is intended to create a joint venture or to constitute either party as agent (for any purpose) of the other".⁸

It appears that historically it was the practice of the railroad to utilize its own employees transporting train crews to and from hotels and between various pick-up and drop-off points along the railroad's lines. At some point NSR contracted with D & T Limousine Co. (D & T Limousine) to perform these services at Conway and NSR's other Western Pennsylvania locations. After D & T Limousine declared bankruptcy in the spring of 1999, NSR contracted

⁶ Reporting to Wagner is an assistant manager. These are the only Employer management representatives for the Pittsburgh subdivision.

⁷ There is one Taxi Service Agreement for the entire Eastern Division.

⁸ The Agreement is for a two-year term continuing on a month to month basis with NSR reserving the right to terminate on 30 days written notice.

with the Employer's predecessor, Milepost Industries, for these services.⁹ Milepost Industries hired the management and clerical staff and most of the drivers of D & T Limousine. At present, NSR, at Conway, continues to supplement the contracted for driver workforce with its own employees. These NSR employees are classified as clerks who NSR is keeping on the payroll until they reach retirement age. Approximately two or three clerks are on duty each shift and, as an incidental part of their other work duties, are called upon to transport railroad personnel and equipment in NSR owned vans.¹⁰ When an NSR clerk is absent from work, or when a NSR van is being repaired, a unit driver is often called into work so that sufficient drivers are available on any given shift.

Three classifications of Employer drivers are utilized by NSR at Conway. Yard drivers are regularly scheduled employees who are responsible for transporting crews and equipment between various locations at the Conway yard or between the yard and local hotels. "Dedicated" drivers are on-call employees who provide necessary transportation services within a 25-mile radius of Conway. Road drivers are on call employees who perform these services beyond a 25-mile radius of Conway.¹¹ The Employer has the responsibility of procuring and maintaining the vans utilized by its drivers.¹²

NSR sets minimum hiring standards for drivers¹³, requires the drivers to pass the same drug screening program given to railroad employees¹⁴, and provides input into the wage rates to

⁹ NSR advanced the Employer \$400,000 to temporarily fund the cost of the Employer's commencement of operations. This advance carries a 6% interest rate and is to be repaid in six equal installments.

¹⁰ There are 14 NSR owned vans at Conway.

¹¹ Fifteen of the unit drivers are classified as yard drivers, with 12 drivers classified as dedicated drivers and 11 as road drivers. NSR clerks act as yard drivers and dedicated drivers when the need arises.

¹² Some vans have the Employer's logo on them while others have a combination of the Employer's and NSR's logos.

¹³ The standards consist of, inter alia, minimum age, limited number of traffic violations, and no record of a DUI violation.

¹⁴ NSR is authorized to subject the Employer's drivers to random drug testing any time the driver is on NSR property or any time the driver is in the presence of a railroad crew which also is being randomly

be paid the drivers based, in large part, on the wages received by its own employees and wages received by other “cab” companies in the area. The Employer establishes its own fringe benefit package without NSR input. The railroad does not interview prospective drivers and the Employer does not submit the names of potential employees for approval.¹⁵

The Employer provides the names of its drivers in the three classifications to NSR for assignment at Conway.¹⁶ Thereupon, NSR’s in-house dispatching operation, known as “jitney control”, is responsible for assigning the drivers to work.¹⁷ In this regard, “jitney control” will advise the driver of the time to report to work, and the time allotted for a particular pick-up of a train crew. Once assigned to a crew, the driver is required to stay with the crew until he is released. At that point, the driver is subject to reassignment by “jitney control”. If a driver desires a day off from work, he advises both the Employer and the railroad so that he is not in the rotation for the following day.

When a driver is on the road, the driver is required to follow the routes set forth in a railroad promulgated route book. In addition, the driver is in contact with the railroad by way of radio, utilizing frequencies used solely by NSR.

The drivers are expected to report to the Employer’s administrative office, located adjacent to the Conway yard, each day to turn in trip tickets and gas slips and, if necessary, to obtain toll road money, pick up their pay and to report any problems with the vans.

All drivers are subject to the rules and regulations set forth in the Employer’s employee handbook. In addition, drivers are subject to various NSR policies when working, including

tested. If a driver refuses to take the test, he is summarily banned from NSR’s property. Similarly, if a driver receives a DUI conviction, he is prohibited by NSR for driving for the railroad.

¹⁵ The record reveals that Pittsburgh subdivision manager Wagner does the hiring for the Employer in the Western Pennsylvania area.

¹⁶ NSR informs the Employer of the number of vans and the number of drivers to be assigned to a particular area. At Conway, the Employer is required to provide 2.5 drivers per van.

¹⁷ At times, with respect to on-call dedicated and road drivers, NSR may first contact the Employer’s central dispatch in Columbus, Ohio concerning the need for one of these drivers to report to work. The Employer’s central dispatch in these circumstances will contact the driver.

NSR's no smoking policy, dress code, hours of work limitations¹⁸, and safety/operating standards. The latter standards are enforced by NSR security who stop drivers frequently for sobriety checks, review of logs and safety inspections. Drivers are required to be familiar with and to follow NSR safety policies, and NSR issues safety inspection checklists to be followed. NSR is rewriting the Employer's safety manual which is given to each new driver. According to the Employer, NSR was of the opinion that the Employer's prior safety manual was "inadequate."

Each morning, Wagner and/or his assistant manager review the previous day's operations with respect to such matters as the number of drivers called to work and their hours of work, whether any drivers failed to report to calls for work and the reasons therefor,¹⁹ and resolving driver complaints. In addition, Wagner, or the assistant manager, conducts new driver orientation sessions wherein the new drivers learn how to prepare trip tickets, become familiar with the various routes and pick up points, learn where they are allowed to park and not to park at the Conway Yard, become familiar with the "jitney control" location at the yard and NSR's reporting to work procedures, and become familiar with the promulgated safety requirements. The new drivers also spend a day or two accompanying a more experienced driver on the runs before the new driver is allowed to operate a van himself.

With respect to disciplinary considerations, the aforementioned "Taxi Service Agreement" provides that NSR has the right to bar any driver from its property and to exclude any driver from performing shuttle service for NSR who, in NSR's judgment, could create "any risk or operating or administrative" problems either because of "[the driver's] refusal to comply with operating safety procedures" . . . "honesty" . . . "discipline problems" . . . "or any other

¹⁸ Hours of work limitations are set forth in the "Taxi Service Agreement".

¹⁹ Wagner testified that he could recall an occasion when he received a report that a driver failed to respond to a call in and thereafter, he had to notify the Employer's headquarters that the reason the driver failed to report was because the driver was in the hospital.

reason [NSR] has for reasonably believing that [the driver] might cause risk or disruption to [NSR's] operations".

Since the Employer commenced operations at Conway in May 1999, NSR, pursuant to the aforementioned provision, has excluded one driver from performing any work for it. In that instance, the driver was observed running a red light while talking on a cell phone. Because the Employer could not reassign him other work in the area, the driver was discharged. On two other occasions, NSR barred drivers from working at the Conway Yard, but not from road work, because of various infractions.

The Employer has the right to conduct an independent investigation concerning incidents resulting in NSR's decision to bar drivers from performing services for it, and to request NSR to reconsider its decision if, in the Employer's opinion, either the misconduct did not occur or was not severe enough to warrant a bar. On each of the three occasions set forth above, the Employer agreed with the NSR's decisions.²⁰ However, the record affirmatively establishes that over the years at locations other than Conway where the Employer has contracts with NSR, the Employer has been successful in having a driver "reinstated" where there was no justification for the driver being barred from railroad property or performing services for the railroad.²¹ Finally, the record establishes that apart from NSR action, the Employer regularly disciplines drivers at Conway for various infractions.

In determining that the Board clearly has jurisdiction in this case, and that referral to the NMB, as requested by the Employer, is unnecessary, I note that the Board asserted jurisdiction on two previous occasions over one of the Employer's principal competitors, which is the entity that had the contract to provide shuttle van service at Conway prior to the Employer. D & T

²⁰ The record contains several examples of instances where crew members did not want to ride in a van operated by certain drivers, albeit for apparently arbitrary reasons. In these circumstances, another van was dispatched to transport the crew.

²¹ On one occasion, the Employer transferred a barred driver from one location in Ohio to another. However, a short time later the NSR representative involved was also transferred to that location and, when he saw the driver working there, barred him from that location.

Limousine Service, Inc. 320 NLRB 859 (1996) and D & T Limousine Service Co., Inc., 207 NLRB 121 (1973).²²

In its post hearing brief, the Employer emphasizes that the work performed by the petitioned-for drivers is work which has been traditionally performed by employees of NSR and, more importantly, that such work is still being performed by NSR clerks at Conway to supplement the Employer's workforce. Thus, the Employer argues that the first part of the two part test developed by the NMB for resolution of such jurisdictional issues as those presented herein is clearly met. In this regard, I note that in neither of the aforementioned D & T Limousine cases did the Board discuss whether the shuttle van services provided by the employer therein were those traditionally performed by employees of rail carriers. Rather, in each of those cases, the Board found that based upon the facts presented,²³ it did not appear that D & T Limousine was a carrier by railroad or a company directly or indirectly owned or controlled by or under common control with any railroad carrier.

The Employer argues that its operations and relationship with NSR demonstrates that NSR exercises significant control over the Employer to the extent sufficient to remove the Employer from the ambit of the Act's jurisdiction. Contrary to the assertion of the Employer, however, the record establishes that the degree of control exercised by NSR does not appear to be sufficient enough for the second part of the NMB's test to be satisfied. In this regard, as in the case at bar, D & T employees who were the subject of the 1973 case were required to comply with the railroad's rules and were often dispatched by railroad employees. In addition, in the 1973 case, D & T was contractually bound to remove employees at the railroad's request for any reason. Moreover, the record indicates that the Employer herein possesses significant

²² In the 1973 case, the Board had referred the question of jurisdiction to the NMB based on D & T's claim that it existed solely to furnish services to Penn Central Railroad, and that D & T employees were under the continuous control of the railroad. In declining to assert jurisdiction, the NMB found that D & T was not covered by the RLA.

²³ As noted, the Board's decision in the earlier case followed a referral to the NMB and was based upon conclusions reached by the NMB.

autonomy in its operations. Thus, the Pittsburgh subdivision manager and assistant manager exercise control over day to day operations of the drivers who work at the Conway facility, such as investigating NSR's complaints about particular employees, making the final decision about the hiring of all applicants, disciplining employees without the railroad's involvement, and establishing corporate policies for its entire operations including the Conway drivers.

In sum, based upon the above, and the record as a whole, I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction. D & T Limousine Service, Inc., 320 NLRB 859 (1996); D & T Limousine Service Co., Inc., 207 NLRB 121 (1973).

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers employed by the Employer at the Conway, Pennsylvania, facility of Norfolk Southern Railroad Company; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.²⁴ Eligible to vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an

²⁴ Pursuant to Section I03.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.²⁵ Those eligible shall vote whether or not they desire to be represented for collective bargaining by Teamsters Local Union 261 a/w International Brotherhood of Teamsters, AFL-CIO.

Dated at Pittsburgh, Pennsylvania, this 30th day of September 1999.

/s/ Gerald Kobell

Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
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²⁵ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc. 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before October 7, 1999. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.